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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTWON MILLSAP,

Defendant and Appellant.

F075033

(Super. Ct. No. BF165125A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Maureen M. Bodo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Antwon Millsap challenges his sentence in this matter, wherein he was convicted of felony transportation of methamphetamine for sale, felony possession of methamphetamine for sale, misdemeanor possession of narcotics paraphernalia, and possession of marijuana (infraction). His sentences on the two felony counts included three-year sentence enhancements pursuant to Health and Safety Code section 11370.2, subdivision (c). He was also sentenced to one year on each of four prison prior sentence enhancements pursuant to Penal Code section 667.5, subdivision (b). The enhancements imposed pursuant to Health and Safety Code section 11370.2, subdivision (c) are stricken, in light of recent amendments to the latter statute. The judgment is otherwise affirmed.

FACTS AND PROCEDURAL HISTORY

Police officers encountered Millsap as he was riding a bicycle in Bakersfield on August 5, 2016. An officer conducted a patdown search of Millsap and found a methamphetamine pipe in his pocket. Subsequently, two baggies containing small amounts of marijuana were found in Millsap's sock. Another baggie, which had fallen out of Millsap's shorts, held six smaller baggies containing methamphetamine. Of the six baggies, one had 3.5 grams of methamphetamine in it and the others each contained one gram. The officers arrested Millsap. Millsap had a California identification card with his photograph and the name Fernando Millsap.

A five-count amended information (information) was filed against Millsap, charging him with two felonies, two misdemeanors, and one infraction. The felony counts were transportation of methamphetamine for sale and possession of methamphetamine for sale. (Counts 1 and 2; Health & Saf. Code, §§ 11379, subd. (a), 11378.¹) The misdemeanor counts were possession of drug paraphernalia and possession

¹ Subsequent statutory references are to the Health and Safety Code unless otherwise specified.

of methamphetamine (a lesser included offense of the felony possession count). (Counts 3 and 4; §§ 11364, 11377, subd. (a).) The infraction was possession of less than 28.5 grams of marijuana. (Count 5; § 11357, subd. (b).) The information charged enhancement allegations in connection with both felony counts, including several prison prior enhancements and enhancements based on a prior conviction, under section 11351, for possession of a controlled substance for sale. (Pen. Code, § 667.5, subd. (b); Health & Saf. Code, § 11370.2, subd. (c).)

A jury convicted Millsap of the two felony counts, misdemeanor possession of drug paraphernalia, and the marijuana possession infraction. The misdemeanor methamphetamine possession count was obviated as it was alleged as a lesser included offense of felony possession of methamphetamine for sale. At a subsequent, bifurcated bench trial, the court found true four prison prior allegations, as well as the enhancement allegations based on Millsap's prior possession for sale conviction.

Millsap was sentenced, in December 2016, to an aggregate term of 11 years (upper term of four years on count 1, three years for the enhancement based on the prior § 11351 possession-for-sale conviction, and one year for each of the four prison priors). Millsap was ordered to serve four years in local custody and the remainder of the term on mandatory supervision, subject to certain conditions. The sentence on count 2 (upper term of three years plus three years for the prior drug conviction enhancement) was stayed under Penal Code section 654, and a concurrent sentence of 180 days was imposed for count 3 (misdemeanor possession of drug paraphernalia).

Effective January 1, 2018, while this case was pending final judgment, sentence enhancements for prior possession for sale convictions under section 11351 were abolished by the Legislature, by amendment to section 11370.2, subdivision (c), the enhancement statute. (Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018.)

DISCUSSION

I. Sufficiency of Proof of Prior Conviction Allegations in Information

The information alleged several prison prior sentence enhancements as well as a prior drug conviction sentence enhancement, in connection with each felony count, i.e., counts 1 and 2. Millsap now contends the evidence adduced to prove these prior conviction allegations was insufficient. We disagree.

At the bifurcated trial on the truth of the prior conviction allegations, the prosecution moved into evidence Millsap's mug shot from his arrest in the instant matter, a certified copy of his California Law Enforcement Telecommunications System (CLETS) rap sheet, the Penal Code section 969B packets (969B packets) related to various prior convictions, and certified copies of California Criminal Justice Information System (CJIS) court dockets related to various prior convictions.

The 969B packets related to prior convictions in Kern County case Nos. BF094512B, BF154823A, and BF158205A (alleged in the information as the basis for three prison prior enhancements; the conviction in case No. BF094512B was also the basis for the prior drug conviction enhancement). The 969B packets contained abstracts of judgment for the offenses of conviction, fingerprint cards, and photographs of the defendant. The CJIS court dockets admitted into evidence related to Kern County case Nos. BF135824A and BF140730A; the convictions in these cases were alleged in the information in connection with two prison prior enhancements.

The CLETS rap sheet, the 969B packets, and the CJIS court dockets showed that Millsap had suffered the relevant convictions as well as the sentences corresponding to these convictions. The court found all the prior convictions alleged in the information to be true. The court further found true the sentence enhancement allegations under section 11370.2, subdivision (c), pertaining to Millsap's prior drug conviction. The court also found four of five prison prior enhancement allegations to be true (the prosecutor

acknowledged and the court agreed that one of the prison prior allegations did not satisfy the requirements of section 667.5, subdivision (b)).

Millsap now argues that proof of the prior convictions alleged in the information was insufficient because the CLETS rap sheet adduced by the People was unreliable. He points to the fact that Millsap's trial counsel had objected to the rap sheet on grounds that it listed a 2002 first degree murder conviction from Los Angeles county, with a 50 years to life sentence, that could not possibly be attributed to Millsap. Millsap further suggests, based on the family criminal history noted in Millsap's probation report, that the 2002 murder conviction was suffered by one of his brothers (the report states that Millsap has eight siblings, including a twin brother). In addition, Millsap observes, again with reference to his probation report, that his father, whose name is similar to an alias used by Millsap, was also incarcerated in the California Department of Corrections and Rehabilitation at the time.

Millsap's claim that the CLETS rap sheet introduced into evidence by the People is unreliable because it contains a 2002 first degree murder conviction with a sentence of 50 years to life is, however, unfounded. When defense counsel told the trial court that the rap sheet contained a 2002 murder conviction with a life sentence, the court specifically asked counsel, "What page are you referring to?" Counsel was unable to pinpoint the page, simply stating, "You know, I'd have to take a look, but in the one I have, it's towards the end of the rap sheet, [and] it references a 2002 conviction in Los Angeles for first degree murder where he would have been sentenced to 50 years to life." Counsel never provided the court with a page cite to the rap sheet. Millsap's briefs also do not provide the requisite cite to the rap sheet. Based on our own review of the entire rap sheet, there is no murder conviction with a 50 year to life sentence reflected on the rap sheet moved into evidence by the People at the bifurcated trial on Millsap's prior convictions. On the contrary, there is only an ambiguous reference to a 2000/2001 *juvenile* murder matter from Arcadia, but this reference is in a subsidiary section of the

rap sheet that *statedly does not list convictions* but only “arrests” and “court disposition[s]” based on “soft criteria” rather than “fingerprints.” Since Millsap was in his thirties at the time of the instant offense, the presence of this juvenile notation in a subsidiary section of the rap sheet does not automatically render the rap sheet suspect or unreliable. Millsap’s briefs do not address this notation or its context, but instead refer only to trial counsel’s unsubstantiated claim at sentencing. In sum, although the rap sheet lists numerous aliases connected to Millsap (evidently based on fingerprints), as well as several social security numbers and two dates of birth, Millsap has not shown it is unreliable because the convictions listed therein are attributable to Millsap’s brothers (including his twin) or his father, rather than to Millsap himself.

It bears mention in this context, as the prosecutor also pointed out, that when Millsap was arrested, he was carrying a California identification card bearing his photograph and the name Fernando Millsap, one of the aliases listed on his rap sheet. In addition, upon his arrest, Millsap was booked into jail as Fernando Singleton Millsap, a name also listed on his rap sheet as an alias. Thus, the fact that the records adduced by the People refer to various aliases for Millsap is not surprising.

Finally, along with the rap sheet, the People adduced, as to each relevant prior conviction and sentence, either a 969B packet containing abstracts of judgments, fingerprint cards, and photos of the defendant, or certified CJIS court dockets. Defense counsel did not object to these records at trial.

We conclude the trial court’s true findings on the applicable prior conviction allegations are supported by substantial evidence. (See *People v. Jones* (1995) 37 Cal.App.4th 1312, 1315 [the test for evaluating the sufficiency of the evidence underlying the trier’s conclusion is “whether substantial evidence supports the [trier’s conclusion], not whether the evidence proves guilt beyond a reasonable doubt.”].)

II. Imposition of Upper Term on Count 1 and Enhancements for Drug Prior

Millsap was sentenced to an aggregate term of 11 years, including the upper term of four years on count 1 (transportation of methamphetamine for sale), three years for the section 11370.2, subdivision (c) sentence enhancement premised on his prior possession for sale conviction under section 11351, and one year for each of four prison prior enhancements under Penal Code section 667.5, subdivision (b).

Millsap argues the trial court abused its discretion in imposing the upper term of four years for the transportation of methamphetamine for sale conviction pursuant to section 11379, subdivision (a), which prescribes punishment of two, three, or four years for this offense. In imposing the sentence of four years, the court found numerous aggravating circumstances and no circumstances in mitigation. As to the aggravating circumstances, the court stated:

“I find ... in aggravation, defendant’s prior conviction[s] as an adult are numerous and sustained[,] in demonstrating a long standing pattern of conduct.

“I find a circumstance in aggravation that defendant was on post-release community supervision when the crime was committed.

“I find that defendant’s prior performance on juvenile probation, misdemeanor probation, felony probation pursuant to [Penal Code section] 1210.1, as well as State parole, was unsatisfactory, in that he fail[ed] to comply with the terms and continued to reoffend.”

When “selecting one of ... three authorized terms of imprisonment, ... the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Cal. Rules of Court, rule 4.420(b).) “Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.” (Cal. Rules of Court, rule 4.421.) A single aggravating circumstance is sufficient to make a defendant eligible for an upper term and for the trial court to impose an upper term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 813,

815, overruled on other grounds by *Cunningham v. California* (2007) 549 U.S. 270.) As to mitigating factors, “[a] trial court may minimize or even entirely disregard mitigating factors without stating its reasons.” (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.) There is no requirement that the upper term be supported by aggravating factors that outweigh the mitigating factors. (Cal. Rules of Court, rule 4.420(b).) Overall, the trial court enjoys broad discretion in its sentencing decisions, subject only to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

The court here found multiple circumstances in aggravation. For the reasons stated above, we reject Millsap’s suggestion that the court’s reference to Millsap’s long criminal history was improper because of the putative unreliability of the rap sheet admitted at the trial of his prior conviction allegations. Any one of the aggravating circumstances cited by the trial court would justify imposition of the upper term. Accordingly, its decision to impose the upper term of four years on count 1 was not an abuse of discretion.

Millsap further challenges the trial court’s imposition of the section 11370.2, subdivision (c) sentence enhancement based on his prior possession for sale conviction under section 11351. He argues the trial court abused its discretion in failing to dismiss these enhancements in the interest of justice, pursuant to Penal Code section 1385. (See *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020.) However, this argument is now moot as, effective January 1, 2018, the Legislature abolished sentence enhancements based on prior drug convictions under section 11351, by amending section 11370.2, the enhancement statute. Furthermore, because the amendment to section 11370.2, subdivision (c), reduces punishment, it applies retroactively to nonfinal judgments such as this one. (Stats. 2017, ch. 677, § 1, eff. date Jan. 1, 2018; see *People v. Millan* (2018) 20 Cal.App.5th 450, 455-456; *People v. Zabala* (2018) 19 Cal.App.5th 335, 338, 344; *In re Estrada* (1965) 63 Cal.2d 740.)

The three-year sentence enhancements imposed pursuant to *former* section 11370.2, subdivision (c), in connection with Millsap's convictions on counts 1 and 2, are therefore stricken.

DISPOSITION

The three-year sentence enhancements imposed pursuant to former section 11370.2, subdivision (c), are stricken. The trial court is directed to prepare an amended abstract of judgment reflecting the changes to Millsap's sentences on counts 1 and 2, and to transmit the amended abstract to the appropriate correctional authorities. In all other respects, the judgment is affirmed.

SMITH, Acting P.J.

WE CONCUR:

SNAUFFER, J.

DESANTOS, J.